

**Committee to Study Compliance with Maine's  
Freedom of Access laws**

**Summary of December 17 Meeting**

Room 438 State House  
Augusta, Maine

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*Members attending:*

**Senator Peggy Rotundo, chair**  
**Representative Ted Koffman, chair**  
**Todd Brackett**  
**Richard Flewelling**  
**Mal Leary**  
**Linda Pistner**  
**Chris Spruce**

**Fred Bever**  
**Jess Knox**  
**Harry Pringle**  
**Jeff Ham**  
**Esther Clenott**  
**Judy Meyer**  
**Elizabeth Prata**

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The chairs called the meeting to order. The meeting started with presentations from Lt. Colonel Jeff Harmon of the Maine State Police. Col. Harmon provided information on the history of State Bureau of Identification fees, including the two major types of record checks: criminal justice and non-criminal justice. Two of the primary developments have come from the shift away from financing of services through a legislative appropriation to a fee-for-service arrangement, and the higher costs of creating and maintaining databases that are available electronically. Both of the changes have resulted in fee increases. They have also expanded the number of categories for fees in recognition of the different types of users and information requests.

Colonel Harmon clarified that up until last year, all funds collected through SBI fees were returned to Department to cover costs. This biennium, about \$100,000 - \$150,000 went into the general fund.

Ted Glesner, State Court Administrator, provided information on court records and search fees. Mr. Glesner explained that prior to last year, the courts had never charged for providing information. Last year, they undertook a comprehensive review of fees and issued a new schedule. This new schedule requires a \$15 fee to be charged if staff time is needed to complete a request. All funds collected go the general fund. Because of the lack of a central electronic database for this information, additional document retrieval time may be required by staff to fulfill a request. He added that Maine's court system is poorly funded, with no allowances for overtime. Mr. Glesner clarified that the public is only charged if research is required. If an individual can provide case identifying information, then no fee is charged. They are in the process of a building a computer system that will allow greater access to this

information in the future. However, because the contractor charges a fee per user, the cost for allowing individuals to access this information on their own would be astronomical.

Jeff Hamm reported back to the full committee on the conclusions of the FOA public records exemption subcommittee. He explained that subcommittee recommended that all exemptions except ones in the FOA law itself should have a sunset clause that terminates the exemption unless the legislature reenacts the exemption. Each exemption would have a 10-year life span, and would be evaluated at the end of the 10 years according to the criteria set out by the committee. Starting in 2006, each joint standing committee would be responsible for reviewing exemptions that fall under its jurisdiction during the second session of each legislature. The same criteria would be applied by the legislature to any new proposed exemptions. The subcommittee also recommended recodifying all exemptions into one section in statute or, at the very least, creating a central location for all exemptions and updating it regularly. Committee members were in agreement with creating a central location. Some members also highlighted the importance of recodifying exemptions.

The committee debated the merits of various exemption review processes, including whether one committee such as Judiciary should be conducting all the reviews, or whether it should be spread out among all the committees. It was suggested that if one committee reviews all exemptions, this would add some consistency to the review and provide the broader perspective of the public's right to know. It will also prevent possible undue influence on the committee of jurisdiction by the interest groups that pushed for the exemption originally. The suggestion was made to possibly combine these concepts by establishing a joint review process with the committee of jurisdiction and, for example, the Judiciary Committee. The OPEGA would provide nonpartisan staff to assist the committees with the evaluation. The committee requested more information on what committee's jurisdictions the exemptions fall under and how many of the approximately 450 exemptions were criminal records, which may not require as much work. The committee further requested a chronology of exemption review flow. Committee members agreed that exemption review criteria and a process should be established. The subcommittee was charged with refining this model, taking into account the concerns that were raised.

The committee moved into a discussion on reproduction fees. Members responded to a document prepared by staff that outlined some of the options available for setting uniform reproduction fees across the state. Committee members generally agreed that there should be a distinction between paper & ink costs and staff time. One member suggested that the option to charge \$5/hour after 8 hours for staff time was too low. A figure of 20 cents per copy was mentioned as a reasonable fee per page.

The committee also debated whether it made sense to distinguish between commercial and non-commercial requests. Questions arose concerning what is considered a "commercial" purpose. A number of members noted that what constitutes a commercial purpose is not always clear. A straw vote of the committee indicated that all members except 2 did not want to include a separate fee structure for commercial and non-commercial requests. Members also questioned the need for waivers for certain individuals. One committee member noted that the wording of the fee language used the term "may" not "shall" when giving authority to charge fees. Public officials already have some discretion.

**[Recommendation]** A straw vote of the committee revealed that 8 members supported including language to allow waivers; 4 members did not support such language.

**[Recommendation]** *The committee agreed that officials may charge \$10/ hour after 2 hours for staff time. The committee further agreed to include language that prevented agencies from charging fees for inspection only.*

Another issue addressed by the committee was how much time a public entity should have to provide the information. Several committee members thought the current law was unclear. Current law requires that a denial be issued within 5 days but is silent on how long officials have before a request must be fulfilled. Federal law allows 20 days for a denial and no time limit on when to provide records. Members debated the merits of imposing a specific time limit for providing records, or even giving an estimate for a time frame. The option of including the phrase “reasonably practicable” as an alternative to imposing a specific number of days was discussed. *Harry Pringle agreed to work on language to do this.* **[Recommendation]** *A straw poll indicated that all but one member agreed to include language that entities have five days to respond to a request affirmatively or negatively. This would require officials to send a letter indicating their decision, unless the records are provided in the 5-day period.*

The committee discussed the feasibility of requiring denials to be accompanied with a statutory cite justifying the denial. While members did not wish to impose undue burdens on officials, there were sentiments that at least a basic reason for the denial should be included. Linda Pistner expressed concerns about requiring a time limit on providing a statutory cite for the denial, or requiring that all the reasons for denying the request be cited. The current system is working relatively well and should not be changed without understanding the potential problems.

The committee addressed the issue of open meetings next. Elizabeth Prata expressed her concern about what the definition of a public meeting. Linda Pistner clarified that a public meeting is when three or members of a multi-member agency gather. The discussion centered on the need for a quorum to conduct or transact public business. A distinction was made between board business and public business. Richard Flewelling noted that public business is transacted all the time outside of public meetings.

Jeff Ham expressed his concern about the current requirement for public notice – the current law requires it to be posted in “ample time”. He would prefer that a minimum number of days be required. Mr. Flewelling agreed that this suggestion would be helpful for town officials who are looking for certainty, as long as this requirement was met by posting a standing meeting schedule notice. The rule of thumb for town meetings is 7 days notice. Concerns about all the ramifications were raised by members. This requirement will apply to all public meetings including emergency, legislative and subcommittee meetings. **[Possible Recommendation]** *Committee members appeared to reach consensus around a 3-day public notice requirement.*

The committee then addressed the issue of the manner of public notice. Mr. Flewelling suggested that the current law works well – the customary method is to post meeting notices at public places. Members noted that the Internet is now playing an important role in

meeting notices. **[Recommendation]** *While this is a great tool for getting the word out, members expressed an interest in adding a cautionary note for public officials to not become overly reliant on technology.*

Committee members then examined executive sessions and examples of when they are used inappropriately. Judy Meyer suggested requiring more detail about the reason provided for going into executive session while being careful to not reveal the identity of individuals who are the subject of the meeting. Senator Rotundo stated that her observation has been that problems with the use of executive sessions reflect a need for more education and training. The issue is one of ignorance, not abuse. Committee members presented several options for monitoring discussion in executive sessions to ensure that officials are not talking about inappropriate issues. These ideas included an ombudsman for citizens, requiring written notes from executive sessions, and requiring a specific reason for the going into executive session.

The committee set a date for the next meeting – Tuesday, January 6<sup>th</sup> from 1 to 4. The subcommittee decided to meet on December 30<sup>th</sup> from 1 – 3 to finalize its recommendations regarding a process for reviewing exemptions.

The next item on the agenda was attorneys fees. Ms. Meyer expressed her concern that individuals are not stepping forward to challenge denials because of the inability to collect fees. She noted that 32 states allow attorneys fees to be collected. Mr. Pringle stated that this proposal would be strongly opposed by MSMA. This would put public bodies in the position of choosing between violating confidentiality laws and freedom of access laws. He further stated that if individuals are permitted to collect attorneys fees, public bodies should be entitled to collect them also. A question arose about the specific language used by other states to allow the collection of attorneys fees. Do any states address the issue of bad faith lawsuits? Several members expressed concern about a possible increase in frivolous lawsuits. Staff were directed to compile information on the specific language used by states that award attorneys fees.

The committee addressed fines/penalties for noncompliance. It was noted that current statute allows penalties to be imposed. However, no members were able to cite a case where a penalty had been levied. Mr. Pringle questioned whether a compliance problem exists. He stated that it's difficult to recruit school board members. Imposing penalties for noncompliance will make recruitment even more challenging. The benefits of having an ombudsman for dispute resolution as a first option were discussed. Mal Leary noted that Virginia has a commission that serves this purpose for the public. Ms. Pistner noted that Maine's Attorney Generals office provides assistance for state agencies, but does not have the resources to provide mediation services at the local level. The subcommittee was tasked with further exploring the Indiana ombudsman model.

Senator Rotundo requested that committee members bring language back to the committee for issues not yet addressed.

The meeting was adjourned.